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Washington, D. C. 20520

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TO

: The Acting Secretary

FROM

ARA - Elliott Abrams

L - Abraham D. Sofaer

SUBJECT:

Compliance with Human Rights Requirements of

Contra Aid Legislation

ISSUE:

Whether to approve an approach for dealing with the human rights and drug dealing requirements of the Contra aid legislation.

Discussion: The legislation providing \$100 million in assistance for the Nicaraguan resistance provides \underline{inter} alia that:

"No assistance . . . may be provided to any group that retains within its ranks any individual who has been found to engage in --

- (1) gross violations of internationally recognized human rights . . .; or
- (2) drug smuggling or significant misuse of public or private funds." (Section 204 (B) of P.L. 99-591.)

We have given considerable thought to how to implement these provisions. The attached memo at Tab A discusses the issues in some detail; its general thrust is summarized below. If you concur with the proposed approach, we will consult with the Agency, the Hill, and the White House. Once those consultations are complete, and any modifications called for have been made, we will prepare for your approval a final paper memorializing the policy.

Consideration must be given to both the process by which decisions will be made and the standards to be used for review.

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A. Decision-making Process:

- A judgment will be made by L and ARA as to whether any particular allegation of a human rights abuse merits an investigation for the purposes of the funding cut-off requirement, i.e. a Section 204 investigation. Generally, findings of the Independent Nicaraguan Human Rights Organization*/ (ANPDH) that members of NDR organizations have engaged in conduct which would constitute a gross violation of human rights (see standards below) will require such investigation. We will also be cognizant of information from intelligence gathering, press reports, and the work of the nascent military prosecutors office (fiscalia). Tab B there is a short memorandum on the progress being made in establishing the fiscalia.) We will give appropriate weight to information taking into account its nature, credibility and source. Section 204 investigation will be initiated when we have sufficient, credible information to establish a prima facie case that a gross violation of internationally recognized human rights has occurred and that NDR personnel are responsible.
- (2) If a difference of view develops between L and ARA as to whether sufficient credible information exists to merit a Section 204 investigation, the issue will be forwarded to P for a decision.
- (3) Once the judgment is made to conduct a Section 204 investigation, a communication will be sent by ARA to the NDR organization concerned indicating the Department's intention to conduct an investigation, and where appropriate requesting that the individual/individuals allegedly involved be placed on an administrative leave status pending the review. The time frame for conducting the investigation will be noted and the organization and individual(s) concerned will be invited to offer evidence and argument regarding the allegations made.

^{*/} ANPDH is an organization headed by Marta Patricia Baltadano a respected attorney with a long and good track record for importial and objective reporting of human rights violations under Samoza and the Sandinistas. *We are currently funding ANPDH's operations. The NDR has previously made its personnel and records available to ANPDH investigations. although access



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- (4) Action officers in L and in ARA will be responsible for preparing a final case report. They will seek to investigate the basis for the allegations and any defenses offered.
- (5) Based on the case report, L and ARA will prepare a memorandum for your decision as to whether the evidence supports a funding that a member or members of a NDR organization receiving US funds have committed gross violations of human rights.

(6) In the event you find that a member(s) of a

USG-funded NDR organization has engaged in gross violations of human rights, a letter will be sent to the organization (copy to the Agency) informing it of the finding, and advising it that if the subject individual(s) does not leave its ranks within one week, US assistance will be suspended so long as the individual(s) is retained in its ranks.

B. Applicable Standards:

In administering this provision of law, our judgment is limited to deciding whether to terminate assistance; we are not engaged in a criminal prosecution which will result in the incarceration of individuals. Thus, while we must act consistent with fundamental principles of fairness and due process in light of the circumstances presented, we should not adhere to the rigorous standards of proof which would apply in a criminal proceeding.

- 1. In making the initial determination to conduct a Section 204 investigation we will need to ask a basic question: given what we understand to be the case based upon credible information, does it appear that there is an individual in the ranks who has engaged in "gross violations of internationally recognized human rights"? Thus, in the first instance, there must appear to be a prima facie case based upon credible information that would warrant termination of aid. Generally, in making the initial judgment we would be guided by the following principles:
 - a) the alleged abuse involves torture or cruel, inhuman or degrading treatment, prolonged clandestine detention or other flagrant and unjustified denial of the right to life, liberty, or security of person

(rough treatment of prisoners, failure to follow appropriate procedures that do not result in serious abuses of the person would not be considered a "gross" violation);

- b) we would give the greater weight, emphasis and attention to alleged violations subsequent to resumption of U.S. humanitarian assistance in August 1985, while not disregarding previous actions where sufficient credible information appears to exist to make further investigation worthwhile;
- c) we would be guided by the standard of "a preponderance of evidence" rather than a "reasonable doubt" standard.

We note in this connection that some of the findings in the recent ANPDH human rights report (attached) would appear to warrant a Section 204 investigation. (In particular, the ANPDH finding that certain NDR personnel summarily executed captured Sandinista soldiers near Cuapa in 198 warrants an investigation in our judgment.)

- 2. Once an investigation is underway we would make every effort to examine the underlying evidence upon which an allegation is based. This includes the evidence relied upon by ANPDH in reaching its conclusions/findings. An opportunity should be given the individual(s) in question to respond specifically to the allegation and to the evidence upon which it is based.
- 3. The final judgment will be based upon the principles in (1) above; as well, it must also take into account any local disciplinary action that might have been taken by local forces. While the law does not mention appropriate local discipline as a reason not to terminate funding, we believe it would be consistent with the law's intent not to terminate funding to an organization which retains an individual in its ranks for the purpose of administering discipline. However, we would insist that the individual not participate in any military activities during the period of disciplinary proceedings and be expelled once all disciplinary proceedings (including incarceration if any) had been completed.

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RECOMMENDATION:

That you approve this proposed course of action and that we proceed to refine this proposal as noted above.

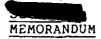
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Attachment A

July 9, 1987



TO: ARA HET Abrams

PROM: L - Abraham D. Gofaer

SUBJECT: Compliance with Human Rights Requirements of Contra Aid Legislation

The legislation providing \$100 million in assistance for the Nicaraguan resistance provides inter alia that

"No assistance . . . may be provided to any group that retains in its ranks any individual who has been found to engage in --

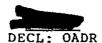
- "(1) gross violations of internationally recognized human rights . . . ; or
- "(2) drug smuggling or significant misuse of public or private funds."

(Section 204(B) of P.L. 99-500)

This seemingly simple provision raises several legal questions. What actions are covered? What is the time period involved? What standard of proof is required? By what process do we "find" that an individual has acted improperly? What is the role of the ANPDH or the resistance in that process? What weight should be given to various other sources of information?

Acts covered

Section 204 does not contain a definition of what actions constitute "gross violations of internationally recognized human rights." This phrase has, however, been defined in another foreign affairs context. Although that definition may not be applicable in every detail in this case, it would be appropriate to refer to other uses of such a phrase for guidance as to Congress' intentions.



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FAA section 502B(D)(1) defines the term "gross violations of internationally recognized human rights" to include "torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person . . "

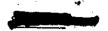
The essence of this definition is that certain categories of actions are considered inexcusable attacks on the "right to life, liberty, or the security of person." [MGK requested reference to rechardment definition and comments. PO's note read something like: note on what is c'd violation, i.e., torture, not roughing up.] [flatiga].

Application of this definition to resistance activities may not always be appropriate. For example, prolonged detention without trial, while always highly undesirable, is more readily characterized as a gross violation of human rights in the case of a government with power and institutions permitting it to conduct trials readily than in that of a rebel force operating in the jungle. It is noteworthy as well that the definition quoted above does not include every offensive but less serious action (for example, unwarranted roughness in conducting arrests or interrogations) which would be considered unacceptable in this country. While it is incumbent on us to discourage this latter category of actions, the law does not require termination of assistance to a resistance organization if it does not expel from its ranks persons conducting such actions.

The legislation refers only to "gross violations" and not, as elsewhere in foreign affairs legislation, to "a consistent pattern" of gross violations. This suggests that individual acts of misbehavior may require expulsion. The law also refers to drug smuggling and misuse of public or private funds. We offer no special definition of these terms (nor do we consider one necessary), but believe that actions falling under these categories should be addressed in the same manner as human rights abuses.

Period of time covered.

The law does not specify the period of time during which the gross violations of human rights or other improper acts must have occurred if they are to trigger termination of assistance, and we do not believe it possible to provide a definitive cutoff date. In particular, we see no legal merit in the proposition that the law applies only to actions taking



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place since enactment of the legislation last October, or since resumption of U.S. humanitarian assistance in August 1985.

On the other hand, the law is intended to address the perceived problem that human rights abusers continue to enjoy positions of authority within resistance ranks. Congress apparently seeks to have the USG pressure the resistance to expel such persons, so they do not feel free to continue their misdeeds. Given the limited resources available for pursuing investigations, and the difficulty of obtaining evidence of long-past events, we could reasonably focus on recent activities. Past activities forming part of a pattern continuing to the present should, of course, betexamined, as well as particularly egregious actions taken by current resistance members. To the extent that resumption of U.S. humanitarian assistance in August 1985 is seen as a watershed in our relationship to the resistance, a pragmatic case might be made for devoting greater attention to events happening after that date than before.

Process for "finding" misconduct

The law does not specify how an individual is to be "found" to have transgressed its terms. Use of the term "found", however, implies a process of investigation and review of the evidence. The USG must act in making such findings consistent with fundamental principles of due process in light of the circumstances presented. We should proceed according to consistent standards and properly balance concepts of due process and substantive justice in reaching conclusions in cases arising under this section.

Standard of proof. This law is a funding bill, not a criminal statute, and the sanction for "violating" its terms is withholding of a benefit from an organization rather than depriving an individual of his freedom. Moreover, Congress necessarily acted with an awareness that it is virtually impossible in current circumstances to develop the kind of evidentiary record that would be required for a criminal trial in the United States. It would accordingly be inappropriate to read into the law a requirement that findings be made only if proved "beyond a reasonable doubt." We believe a more appropriate standard is that the misdeed be démonstrated by a "preponderance of the evidence" — i.e., that on balance the credible evidence leads to the conclusion that a gross human rights violation took place.

Although any finding that assistance must be cut off will likely be interpreted widely, if inaccurately, as a conclusive

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statement that gross human rights abuses have been proved, the desire to avoid such misunderstandings is not an adequate basis for applying a higher standard of proof than that described above.

Who makes the finding. The law does not specify how the finding is to be made, or by whom. Given the preeminent policy role given the Secretary of State by the legislation, it is our view that this finding is properly to be made by the Secretary or his designee.

Under the law it is the responsibility of the USG, not the resistance forces, ANPDH, or any other outside entity, to make the "finding" that an individual has committed gross violations of human rights (potentially) requiring a cut-off. When in possession of information sufficient to make a finding, the confidence we repose in ANPDH will normally permit us to rely on its investigation rather than expend major efforts to conduct our own parallel investigations. Of course, this judgment would have to be reexamined were there any firm reason to believe that ANPDH is not conducting thorough, unbiased and professional investigations. As in our own courts, moreover, we should expect from ANPDH, not merely its conclusions, but also its findings, and the evidence proved which it relies.

Role of the fiscalia. The resistance is in the process of establishing a fiscalia for the purpose of investigating and trying both human rights abuses and the broader category of offenses by resistance members against military discipline. We have been working with them in this effort, but — especially in light of the recent friction between ANPDH and the resistance which is in part responsible for the current fiscalia activity — cannot at this point predict when the fiscalia will be in place or how vigorous, credible or wideranging its activities may be.

We should be prepared, however, to place reliance on the fiscalia in making determinations of human rights abuses as soon as it has established a track record of credible investigation and prosecution of such abuses by resistance personnel. Until then, we could not appropriately defer making our own findings.

The resistance apparently intends that the <u>fiscalia</u> in time wholly duplicate the investigatory functions now being conducted by ANPDH, and that ANPDH in the end have no role with respect to allegations of resistance abuses. We should





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have no objection in principle to such a development. Indeed, it is highly desirable that the resistance effectively and credibly police itself, and helping the resistance develop and apply such a capacity is among our principal policy goals. It was the prolonged failure of the resistance to police itself, however, which led to creation of the ANPDH and enactment of section 204. Even if <u>fiscalia</u> reports came to be accepted as credible, we may well decide to continue our own parallel activities.

Special Atlantic Coast problems. The Indian and other Atlantic Coast resistance organizations may present special problems. At this time, there is no human rights organization or fiscalia with adequate jurisdiction to investigate human rights abuses by these groups. Moreover, these groups are far less well organized than the major forces, and it is not clear that the command structure is capable of forcing cooperation by Indian or Atlantic Coast commanders and troops with a human rights investigation or resulting sanctions. Finally, it appears that through an essentially democratic process the Rus Rus assembly decided to "forgive and forget" with respect, notably, to accusations of human rights abuses leveled against Steadman Fagoth.

As a result, it will be far more difficult to work through the structures of indigenous resistance organizations than to work with other resistance forces, and the USG will likely have to take a direct role in pursuing allegations of abuses and removing wrongdoers from the ranks of Atlantic Coast resistance groups. We may face difficult decisions in the event a group proves unable to remove a wrongdoer.

Other information sources. In the final analysis, our finding must be made on the basis of information we ourselves conclude is credible. Many potential sources of such information exist.

Inquiries are often set in train by press allegations -some of which contain a germ of truth but many of which are so
distorted that they cannot serve as an independent basis for
concluding that gross human rights abuses have taken place. We
believe, in fact, that press accounts alone cannot responsibly
be relied on to trigger a section 204 cutoff. Allegations made
by credible news organizations and reporters should, however,
be investigated with care.





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Embassy Managua reporting is another important asset, since it is the only direct and unfiltered information available to us from non-resistance sources in the field. The Embassy is, moreover, often able through careful examination to extract useful information from the GON, internacionalistas and other unsympathetic parties. It goes without saying that other agency resources are potentially extremely useful in some cases. Similarly, State and other agency representatives in Honduras can obtain important information from resistance headquarters as well as from participants in particular events.

Our basic pool of information in each case, will consist of a mix from the above sources, in addition to information provided by ANPDH and eventually the fiscalia. Some cases may be so clear that we can and must act immediately. In many cases, however, the accused should be allowed to challenge charges against him. (We must also, of course, inform the organization itself of our conclusions, since it must act to remove the individual. In most cases, it will already be aware of the accusations and may have helped investigate them.) A two-week period would appear adequate in most cases. During that period, when reasonable grounds exist to believe that a violation of the applicable standard has occurred, the accused should be placed on the equivalent of administrative leave—with no involvement in resistance activities—rather than being suspended or purged.

Conclusions

Section 204 requires that the USG cut off assistance to a resistance group whenever it concludes that the group has failed to discipline a member who has engaged in gross human rights abuses. The standard for making this finding should be that of a preponderance of the evidence; proof beyond a reasonable doubt is not required. On some occasions it may be appropriate to rely on ANPDH to investigate alleged abuses and to accept that organization's conclusion that an individual is innocent of wrongdoing, but it is not yet appropriate to give similar weight to findings of the nascent resistance fiscalia. The USG should pursue credible allegations of human rights abuses through all reasonable means and sources.

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